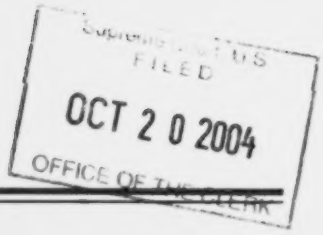
(2)

No. 04-315



IN THE

Supreme Court of the United States

WILFERT BROTHERS REALTY COMPANY, ET AL.,

Petitioners,

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

JOINT REPLY TO OPPOSITION OF RESPONDENTS

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Counsel for Petitioners

Date: October 20, 2004

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Petitioners reply to one new question raised by Respondents not discussed in the Joint Petition For Writ Of Certiorari:

2. May this Court consider the Petition for Writ of Certiorari even though the petition was filed twenty-eight days late?

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TABLE OF AUTHORITIES

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Massachusetts Rules of Appellate Procedure

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED

A. The Massachusetts Supreme Judicial Court Enlarged The Time For Filing A Petition For Rehearing

Respondents erroneously argue that the Massachusetts Supreme Judicial Court neither acted on Petitioners' Joint Motion To File Petition For Rehearing Late, nor enlarged the time to file by order, thus making the Petition for Writ of Certiorari untimely. In fact, the Supreme Judicial Court did both as evidenced in its recently clarified docket. See docket entry # 54, A. 13a.

Supreme Court Rule 13.3 reads, in relevant part:

> where a petition for rehearing is timely filed in the lower court, the time to file the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing.

The Supreme Judicial Court issued its full opinion, also known as the rescript opinion, in this case on May 6, 2004. See docket entry # 51, A. 12-13a. Under Rule 27 (a) of the Massachusetts Rules of Appellate Procedure, a petition for rehearing should be filed "within fourteen days after the date of the rescript *unless the time is shortened or enlarged by order.*" Mass. R. App. P. 27 (a) (emphasis supplied).

Consistent with the Supreme Judicial Court's practice, Petitioners filed their Joint Motion to File

Petition for Rehearing Late together with their Petition for Rehearing on May 28, 2004, twenty-two days after the date of the rescript opinion. A. 13a. The Supreme Judicial Court allowed the motion. See docket entry # 54.[1] A. 13a. There is no doubt that the Supreme Judicial Court enlarged the time for filing the Petitioners' Petition for Rehearing making it a timely filing under Mass. R. App. P. 27 (a). Consequently, the Petition for Certiorari filed with this Court fell squarely within the dictates of Supreme Court Rule 13.3.

B. The Massachusetts Supreme Judicial Court Considered The Petitioners' Timely Filed Joint Petition For Rehearing On Its Merits

Respondents also incorrectly argue that the Supreme Judicial Court did not consider the Joint Petition For Rehearing on its merits. The Order received by all the parties of record clearly indicates that the lower court not only considered the petition as timely, but also considered the petition on its merits.

On June 3, 2004, the Supreme Judicial Court entered its Notice Of Denial Of Petition For Rehearing, stating that "[t]he Petition for Rehearing filed in the above captioned case has been considered by the court and is denied." A. 15a. The Order unequivocally states that the petition was considered, and the absence of further discussion does not establish that it was not considered on its merits, as asserted by Respondents.

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[1] Petitioners filed a motion to clarify the Supreme Judicial Court's docket on October 14, 2004, which was allowed, because the docket, at that time, did not explicitly state that Petitioners' motion had been allowed. See docket entry # 60, A. 14a.

Respondents cite to *Bowman v. Loperena*, 311 U.S. 262 (1940), for the rule determining when time begins to run for purposes of Rule 13.3, however, their citation is incomplete. Respondents fail to note that unlike the case at hand, the *Bowman* Court dealt with an untimely petition for rehearing. Moreover, relying upon an exception to the rule, *Bowman* held that the appeal in that case was timely. Specifically, *Bowman* held:

> [t]he filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. *But where the court allows the filing, and after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.*

Bowman, 311 U.S. at 266 (citations omitted)(emphasis added). Thus, even if Petitioners' Petition for Rehearing was considered untimely, the *Bowman* rule applies in this case where the Supreme Judicial Court allowed the filing and considered the petition on its merits.

CONCLUSION

The Supreme Judicial Court's docket clearly shows that the time for filing Petitioners' Petition for Rehearing was enlarged by order and was considered on its merits, refuting Respondents' jurisdictional argument.

Respectfully submitted,

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Date: October 20, 2004

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APPENDIX A

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY vs.
GERALDINE ROSS & another
SJC-09002

CASE HEADER

Case Status	Decided, cert. pending
Nature	Discrimination law
Appellant	Plaintiff
Brief Status	
Quorum	Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, Cordy, JJ.
Argued Date	02/03/2004
AC/SJ Number	2003-P-0377
DAR/FAR Number	DAR-13364
Lower Court	Suffolk Superior Court
Route to SJC	Direct Appellate Review
Status Date	09/13/2004
Entry Date	04/29/2003
Case Type	Civil
Brief Due	
Decision Date	05/06/2004
Citation	441 Mass. 549
Lower Ct Number	SUCV2002-00880
Lower Ct Judge	Peter W. Agnes, Jr., J.

ADDITIONAL INFORMATION

Full party name:	Massachusetts Bay Transportation Authority
Full party name:	Massachusetts Commission Against Discrimination
Note:	Released as Stonehill College v. MCAD

INVOLVED PARTY	ATTORNEY APPEARANCE
Mass. Bay Transportation Authy. Plaintiff/Appellant Blue br, app & reply Br filed 18 Main Br., 18 App., 18 Reply Br. 1 Extension, 39 Days	Walter M. Foster, Esquire H. Reed Witherby, Esquire Sarah E. Lent, Esquire
MA Comm. Against Discrimination Defendant/Appellee Red brief filed 18 Main Br. 1 Extension, 32 Days	Robert L. Quinan, Jr., A.A.G. Simone Liebman, Esquire Beverly I. Ward, Esquire
Geraldine Ross Defendant/Appellee Red br, app & reply br filed 18 Main Br., 18 Reply Br. 1 Extension, 32 Days	Robert S. Mantell, Esquire Kevin G. Powers, Esquire Harold L. Lichten, Esquire Lara Sutherlin, Esquire Inactive
MA Employment Lawyers Assoc. Amicus Amicus brief filed 18 Main Br.	James S. Weliky, Esquire Laura M. Unflat, Esquire Robert S. Mantell, Esquire
Attorney General Amicus Amicus brief filed 18 Main Br.	John E. Bowman, Jr., Esquire

Women's Bar Association Amicus	Ellen J. Zucker, Esquire
New England Legal Foundation Amicus Amicus brief filed 4 Main Br.	Christine Hughes, Esquire
Associated Industries of Mass. Amicus On brief of another party	Christine Hughes, Esquire
Boston Area Mangt. Attys. Group Amicus On brief of another party	Arthur G. Telegen, Esquire Anjali Parekh Prakash, Esquire Richard L. Alfred, Esquire Sally Adams, Esquire James M. Paulson, Esquire
Town of Agawam Amicus Amicus brief filed 18 Main Br.	David A. Robinson, Esquire
Nat'l Employment Lawyers Assoc. Amicus	James S. Weliky, Esquire Laura M. Unflat, Esquire
Halifax & Barnstable Housing Aut Amicus	Martin J. Rooney, Esquire
Jewish Alliance for Law & Social Amicus Amicus brief filed 18 Main Br.	Joel P. Suttenberg, Esquire

American Civil Liberties Union Amicus Amicus filed brief 18 Main Br.	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
Women's Bar Assoc. of MA Amicus On brief of another party	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
Lawyers' Comm't for Civil Rights Amicus On brief of another party	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
GLAD Amicus On brief of another party	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
MA Lesbian and Gay Bar Assoc. Amicus On brief of another party	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
Acushnet Housing Authority Amicus Amicus brief filed 18 Main Br.	Martin J. Rooney, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
04/29/2003	#1	Entered. Notice to counsel.
04/29/2003		Transferred from Appeals Court: No briefs have been transferred.
05/02/2003	#2	Letter from Mass. Bay Transportation Authority regarding the briefing schedule: The motion to extend time to file appellant's brief was allowed by the Appeals Court to 6/27/03. (Noted)
05/05/2003		ALLOWANCE (prior motion w/appeals was allowed) of Paper #2 to 06/27/2003 for filing of brief of Plaintiff/Appellant Mass. Bay Transportation Authy.. Notice to counsel.
07/01/2003	#3	SERVICE of brief & appendix for Plaintiff/Appellant Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire.
07/08/2003	#4	MOTION TO EXPAND THE RECORD, filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire. *Referred to the quorum. Notice sent.
07/14/2003	#5	OPPOSITION to Paper #4 (Motion to Expand the record), filed by Massachusetts Commission Against Discrimination and Geraldine Ross. *REFERRED TO THE QUORUM. NOTICE SENT.

07/23/2003	#6	NOTICE of October argument sent.
07/24/2003	#7	MOTION to extend to August 29, 2003, filing of brief of Mass. Commn Against Discriminatn & another by Simone Liebman, Esquire, Robert L. Quinan, Jr., A.A.G., Harold L. Lichten, Esquire, Lara Sutherlin, Esquire.
07/24/2003		ALLOWANCE of Paper #7 to 08/29/2003 for filing of brief of Defendant/Appellee Mass. Commn Against Discriminatn. Notice to counsel.
08/29/2003	#8	MOTION TO FILE AMICUS BRIEF, filed for Massachusetts Employment Lawyers Association by Robert S. Mantell, Esquire.
08/29/2003	#9	SERVICE of amicus brief for Massachusetts Employment Lawyers Association by Robert S. Mantell, Esquire.
08/29/2003	#10	SERVICE of brief for Defendant/Appellee Geraldine Ross by Harold L. Lichten, Esquire, Lara Sutherlin, Esquire.
08/29/2003	#11	SERVICE of brief for Defendant/Appellee Mass. Commn Against Discriminatn by Simone Liebman, Esquire, Robert L. Quinan, Jr., A.A.G.
09/10/2003	#12	MOTION to extend to 9/18/93 filing of reply brief of Mass. Bay Transportation Authy. by Walter M. Foster, Esquire. *ALLOWED. Notice sent.
09/11/2003	#13	ORDERED for argument on October 7. Notice sent.

09/18/2003	#14	SERVICE of appellant's reply brief for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire.
09/19/2003	#15	APPEARANCE of Robert S. Mantell, Esquire for Geraldine Ross. (Noted)
10/01/2003	#16	SERVICE of amicus brief for Amicus Atty. General by John E. Bowman, Jr., Esquire
10/07/2003		Oral argument held. (CJM G I S C SN CY).
10/16/2003	#17	ORDER (By the Court): This case will be reargued at the Court's February, 2004, sitting. The parties may, if they wish, file supplemental briefs or memoranda on or before January 15, 2004, on the question whether Dalis v. Buyer Advertising, Inc., 418 Mass. 220 (1994), was correctly decided. See attached copy of amicus announcement. (Notice to counsel.)
10/16/2003	#17.5	ANNOUNCEMENT: Theses cases (SJC-9002, -9081, -9100, -9112) involve a variety of issues regarding the assertion of jury trial rights by parties that were respondents in proceedings before the Massachusetts Commission Against Discrimination. See Lavelle v. MCAD, 426 Mass. 332 (1997). Amici are invited to address the various issues raised by the parties as well as the additional question, not raised by the parties, whether Dalis v.

		Buyer Advertising Inc., 418 Mass. 220 (1994) was correctly decided. Arguments are scheduled for Feb. 2004. (Distributed to list on file.)
10/23/2003	#18	Additional 12 copies of brief, reply brief and record appendix filed by Mass. Bay Transportation Authy..
12/16/2003	#19	NOTICE of February argument sent.
01/08/2004	#20	ORDERED for argument on February 3. Notice sent.
01/09/2004	#21	MOTION to extend to 1/20/2004 filing of Supp. Br. for Mass. Commn Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *ALLOWED. No further extensions. Notice sent.
01/12/2004	#22	MOTION to extend to date filing of Supp. Br. for MA Comm. Against Discrimination by Stephen S. Locke, Esq. Allowed. Notice.
01/13/2004	#23	SERVICE of amicus brief for Amicus Town of Agawam by David A. Robinson, Esquire.
01/15/2004	#24	MOTION to extend to January 23, 2004, filing of Amicus Brief, filed for Nat'l Employment Lawyers Assoc. by James S. Weliky, Esquire, Laura M. Unflat, Esquire.
01/15/2004	#25	SERVICE of supplemental brief filed for Geraldine Ross by Robert S. Mantell, Esquire, Kevin G. Powers, Esquire, Harold L. Lichten, Esquire.
01/16/2004	#26	MOTION TO FILE AMICUS BRIEF, filed for Halifax & Barnstable Housing Aut by Martin J. Rooney, Esquire. *Amicus brief to be filed

		w/a motion to file late. Notice sent.
01/16/2004	#27	SERVICE of supplemental brief filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire.
01/20/2004	#28	MOTION TO FILE AMICUS BRIEF, filed for New England Legal Foundation & others by Christine Hughes, Esquire, Arthur G. Telegen, Esquire, Richard Alfred, Esquire, James M. Paulson, Esquire.
01/20/2004	#29	SERVICE of for Amicus New England Legal Foundation & others by Christine Hughes, Esquire, Arthur G. Telegen, Esquire, Richard L. Alfred, Esquire, James M. Paulson, Esquire. *(18) copies filed also addressing SJC-9081, SJC-9100, SJC-9112.
01/22/2004	#30	MOTION to File Non-Conforming Brief One-Day Late, filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *Late filing accepted. Referred to the Justices in all other respects.
01/22/2004	#31	SERVICE of supplemental brief filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *10 copies.
01/22/2004	#32	SERVICE of amicus brief for Amicus Jewish Alliance for Law & Social by Joel P. Suttenberg, Esquire. *18 Joint copies filed for SJC-9002, SJC-9112, SJC-9081, SJC-9100.

01/23/2004	#33	SERVICE of amicus brief of MA Employment Lawyers Assoc. by James S. Weliky, Esquire, Laura M. Unflat, Esquire.
01/23/2004	#34	MOTION TO FILE AMICUS BRIEF, filed for American Civil Liberties Union and others by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.
01/23/2004	#35	SERVICE of amicus brief for Amicus American Civil Liberties Union & others by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.
01/26/2004	#36	MOTION TO FILE AMICUS BRIEF, filed for Achusnet Housing Authority by Martin J. Rooney, Esquire.
01/26/2004	#37	SERVICE of amicus brief for Amicus Achusnet Housing Authority by Martin J. Rooney, Esquire.
01/29/2004	#38	MOTION to Adjust the Allocation of Oral Argument Time, filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *Allowed as to allocation of requested time for argument.
01/29/2004	#39	MOTION to permit filing of reply brief and response to MCAD's motion to adjust Walter M. Foster, Esquire, filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire. *Allowed.

		Reply brief to be filed on or before Feb. 26, 2004. *Notice sent.
01/29/2004	#40	MOTION for Leave to Participate in Oral Argument and to file Supplemental Brief, filed for New England Legal Foundation et als, by Christine Hughes, Esquire. ALLOWED. Amici may argue 7 mins. in SJC-9002. Amici may submit a supplemental brief on or before February 26, 2004. Notice.
02/02/2004	#41	MOTION to participate in oral argument, filed for American Civil Liberties Union by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.
02/03/2004		Oral argument held. (CJM G I S C SN CY).
02/26/2004	#42	MOTION to File Supplemental Brief, filed for Geraldine Ross by Robert S. Mantell, Esquire, Kevin G. Powers, Esquire, Harold L. Lichten, Esquire. (Referred to the quorum)
02/26/2004	#43	SERVICE of appellee's supplemental brief for Geraldine Ross by Robert S. Mantell, Esquire, Kevin G. Powers, Esquire, Harold L. Lichten, Esquire. (Referred to the quorum)
02/26/2004	#44	SERVICE of supplemental amicus brief for New England Legal Foundation, Associated Industries for Mass. and Boston Area Management Atty. Group., filed by Christine Hughes, Esquire.

02/26/2004	#45	MOTION to File Supplemental Brief, filed for MA Comm. Against Discrimination & another by Beverly I. Ward, Esquire. (Referred to the quorum)
02/26/2004	#46	SERVICE of supplemental brief filed for MA Comm. Against Discrimination & another by Steven Locke, Esquire, Beverly Ward, Esquire, Lynn Milinazzo-Gaudet, Esquire.
03/01/2004	#47	SERVICE of appellant's reply brief for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire. (Reply to Supplemental Brief). (Dist'd to the quorum)
03/29/2004	#48	SUPPLEMENTAL CITATION: Lavecchia v. Massachusetts Bay Transportation Authority, 441 Mass. 240 (2004), filed for Geraldine Ross by Harold L. Lichten, Esquire. *Distributed to quorum.
04/21/2004	#49	SUPPLEMENTAL CITATION filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire. *Referred to the quorum.
05/03/2004	#50	NOTICE of Change of Firm Address filed by Walter M. Foster, Esquire.
05/06/2004	#51	RESCRIPT (Full Opinion): The Massachusetts Bay Transportation Authority's request in the Superior Court for a jury trial is struck. The case is to be deemed as a case filed in the Superior Court for review and

		decision under G.L. c. 30A, on the records prepared before the Massachusetts Commission Against Discrimination in the G.L. c. 151B, s. 5, proceedings. On this basis, the case is to stand for further proceedings in the Superior Court.
05/20/2004	#52	MOTION to remit issue of appellate attorneys fees to trial court, filed for Geraldine Ross by Robert S. Mantell, Esquire, Harold L. Lichten, Esquire.
05/28/2004	#53	OPPOSITION to Paper #52 (Motion of Appellee Geraldine Ross to Remit Issue of Appellate Attorneys Fees to Trial Court), filed by Mass. Bay Transportation Authy.. *Distributed to quorum.
05/28/2004	#54	JOINT MOTION to File Petition for Rehearing Late, filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire. Allowed. (By the Court.)
05/28/2004	#55	PETITION FOR REHEARING, filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire. *Filed collectively w/other parties.
06/03/2004	#56	DENIAL of petition for rehearing. (By the Court) Notice to counsel.
06/04/2004		RESCRIPT ISSUED to trial court.
07/21/2004	#57	MOTION for Reconsideration of the Court's Order to deny the award of Attorneys fees and costs, filed for Geraldine Ross by Robert S. Mantell, Esquire, Kevin G.

		Powers, Esquire, Harold L. Lichten, Esquire. (Denied) By the Court. Notice sent.
08/02/2004	#58	OPPOSITION to Paper #57 (Motion of Appellee Geraldine Ross for Reconsideration...), filed by Mass. Bay Transportation Authy.. *NOTED.
09/13/2004	#59	Notice: Certiorari petition filed in U.S. Supreme Court.
10/14/2004	#60	(Fax Copy) Joint Motion of the respondent employers for clarification of the S.J.C. record, filed by the parties. (Allowed) Notice sent.

APPENDIX B

Supreme Judicial Court
for the Commonwealth of Massachusetts
One Beacon Street, Third Floor,
Boston, Massachusetts 02108
(617) 557-1020

Walter M. Foster, Esquire
Smith & Duggan, LLP
Lincoln North
55 Old Bedford Road
Lincoln, MA 01773

RE: No. SJC-09002

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY
vs.
GERALDINE ROSS & another

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Susan Mellen, Clerk

Dated: June 3, 2004

To: Walter M. Foster, Esquire
Simone Liebman, Esquire
Robert L. Quinan, Jr., A.A.G.
Beverly I. Ward, Esquire
Harold L. Lichten, Esquire
Kevin G. Powers, Esquire
Robert S. Mantell, Esquire
James S. Weliky, Esquire

Laura M. Unflat, Esquire
John E. Bowman, Jr., Esquire
Ellen J. Zucker, Esquire
Christine Hughes, Esquire
Arthur G. Telegen, Esquire
Richard L. Alfred, Esquire
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David A. Robinson, Esquire
Martin J. Rooney, Esquire
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